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# TORTIOUS INTERFERENCE WITH CONTRACT AND PROSPECTIVE ADVANTAGE IN ILLINOIS

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Legal education often depicts law as collections of abstractions which can be cropped, bundled and forced into specific categories. Each category represents a distinct area of law which can be denominated as contracts, torts, property, or another such label. While this compartmentalization may help law students deal with complex quanta of information, novice attorneys soon discover that most areas of law are not so distinct.

For this reason, actions for tortious interference with contract and tortious interference with prospective advantage<sup>1</sup> have been particularly problematic for both the bench and bar.<sup>2</sup> Because these actions may be based

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1. The Restatement (Second) of Torts refers to these torts as the intentional "interference with existing or prospective contractual relations." RESTATEMENT (SECOND) OF TORTS introductory note to ch. 37, at 4 (1979). The Reporter for the Restatement (Second) of Torts succinctly characterized the scope of these torts in its summary of the applicable provisions of the Restatement as follows:

Section 766 states the rule applicable to interference by intentionally inducing or otherwise causing a third party not to perform his contract with the injured party. Section 766A states the rule applicable to intentional interference by preventing the injured party from performing his own contract with a third person or by making his performance more burdensome or expensive. Section 766B states the rule applicable to intentional interference with prospective advantageous economic relations. Section 766C states the rule for negligent interference. Section 767 treats the question of when interference is improper and therefore actionable. It indicates the significant factors and describes the relative appraisal and balancing of the factors required for making a determination in a particular case when no established privilege has developed. Section 768 deals with competition as a proper ground for interference with prospective relations. . . .

*Id.* introductory note to div. 9, at 2-3 (1979).

2. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 129, at 927 (4th ed. 1971) [hereinafter cited as PROSSER]. The extent of these interference torts is illustrated in the opening paragraphs of a recent article by Professor Dobbs:

If I persuade you to breach your contract with another person, I have committed a tort to that person unless I can show some special privilege to interfere. . . . Very similarly, if I persuade you to leave your spouse, I am liable to your spouse under the American common law rule where it has not been changed by statute or overruled by case law. I may also be liable for interference without direct persuasion if I commit an act I know will cause you to terminate your dealings with another. It should go without saying that I am also liable if I interfere with contract relations of others through tortious means, for example, by injuring or libel-

on the conceptually distinct theories of tort, property or contract, courts have been able to interchange recoveries traditionally reserved to each one of these theories.<sup>3</sup> The incidence of litigation based upon tortious interference with contract and prospective advantage has risen dramatically in recent years,<sup>4</sup> and, in light of the increasingly competitive pressures on businesses and professionals, this trend can be expected to continue.<sup>5</sup> Thus, it is im-

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ing one of the parties. By analogy this kind of liability may also be imposed when there is no contract at all between the parties, and when the contract they do have is terminable at will.

Dobbs, *Tortious Interference With Contractual Relationships*, 34 ARK. L. REV. 335, 335 (1980) [hereinafter cited as Dobbs, *Tortious Interference*]. One problem in analyzing the interference torts is that there exists, as yet, no clearly established criteria for a prima facie case. As the Restatement (Second) of Torts states, the interference torts are intentional torts, "in the sense that the defendant must have either desired to bring about the harm to the plaintiff or have known that this result was substantially certain to be produced by his conduct." Also, a defendant's conduct may be considered privileged in certain circumstances; nevertheless, "there is no clearcut distinction between the requirements for a prima facie case and the requirements for a recognized privilege." RESTATEMENT (SECOND) OF TORTS introductory note to ch. 37, at 4-5 (1979).

3. See, e.g., *Crummer v. Zalk*, 248 Cal. App. 2d 794, 57 Cal. Rptr. 185 (1967) (tortfeasor found guilty of inducing breach of contract and held liable for plaintiff's expectancy interest); *Swaney v. Crawley*, 133 Minn. 57, 157 N.W. 910 (1916) (in wrongful interference action, special damages limited to those recoverable for breach of contract); *DeLong Corp. v. Morrison-Knudsen Co.*, 20 A.D.2d 104, 244 N.Y.S.2d 859 (1963) (court viewed injury to a contract right as injury to a property interest, and designated this comparison as an "elementary legal equivalence"), *aff'd*, 14 N.Y.2d 346, 200 N.E.2d 557, 251 N.Y.S.2d 657 (1964). But see *Duff v. Engelberg*, 237 Cal. App. 2d 505, 47 Cal. Rptr. 114 (1965) (recovery permitted even for unforeseeable damages resulting from wrongful interference with contract to convey real property). Most cases involve a tort and a consequent damages claim. When damages are not apparent from the nature of the interference, the remedies may be based on unjust enrichment. See generally D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 6.4, at 458 (1973) (discussion of potentially available remedies in tortious interference actions) [hereinafter cited as DOBBS, HANDBOOK].

Other remedies available to plaintiffs include: "damages for mental suffering, loss of reputation and punitive damages," DOBBS, HANDBOOK, *supra*, § 6.4, at 463; liquidated damages, *id.* at 463-64; restitution, *id.* at 465; and injunctive relief, *id.* at 466. See generally H. Perlman, *Interference With Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61, 128 (1982) (tortious remedies are appropriate when defendant has committed unlawful acts, but those remedies "[work] at cross-purposes with contract . . . remedies [which] promote efficiency" if applied to behavior which would be lawful except for the interference); Note, *Tortious Interference With Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort*, 93 HARV. L. REV. 1510, 1539 (1980) (development of tortious interference liability reflects the changing concepts of property, tort, and contract law, while the original conflict raised by this tort—"which forms of interference to permit and which to forbid—remains the central question today").

4. In general, the expansion of liability in tort law has not bypassed these torts, although one writer opined that his fellow commentators may have assisted the expansion of the interference torts "by their characterization of cases if nothing else." Dobbs, *Tortious Interference*, *supra* note 2, at 336 & n.13. Professor Dobbs points to Dean Prosser's citation of tortious interference cases which, according to Dobbs, "were based explicitly or could have been based on a third-party beneficiary claim under the contract itself." *Id.* (citing PROSSER, *supra* note 2, § 129, at 935 n.17).

5. See Dobbs, *Tortious Interference*, *supra* note 2. Professor Dobbs disapproves of this trend and recommends a "more sceptical approach . . . , one less committed to the unjustified belief that liability must always expand." *Id.* at 376.

portant to understand the rules, policies, and procedures surrounding interference actions so that potential interference claims can be recognized.

#### AN OVERVIEW

In general, the interference tort remedies are designed to protect plaintiffs from unjustifiable interference with their commercial or economic relationships.<sup>6</sup> The interference torts include interference with contract, injurious falsehood,<sup>7</sup> and interference with prospective advantage.<sup>8</sup> All of these torts address the same general wrong—the deprivation of an individual's benefits derived from commercial relations with others.<sup>9</sup> Protected relation-

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6. PROSSER, *supra* note 2, § 127, at 915; Harper, *Interference with Contract Relations*, 47 NW. U.L. REV. 873 (1953) (this tort protects the individual's interest in the security and integrity of his contractual and business relations); see Green, *Injuries by Third Persons to Commercial Relational Interests*, 29 ILL. L. REV. 1041 (1935) [hereinafter cited as Green, pt. I]; Green, *Relational Interests—Commercial Relations*, 30 ILL. L. REV. 1 (1935) [hereinafter cited as Green, pt. II]. Dean Green noted that “[c]ommercial trade relations are the most numerous, complex and perhaps valuable interests which men recognize.” Green, pt. II, *supra*, at 1. Dean Green also remarked that the judicial process of developing doctrines to protect these interests was slow but adequate. *Id.* at 45.

7. The tort of “injurious falsehood” or “commercial disparagement” deals with commercial or economic interferences carried out by means of false statements. Injurious falsehood can be distinguished from defamation by the fact that in the former, the alleged statement was not personally defamatory, yet it resulted in financial loss. This cause of action seeks to protect legally enforceable property interests. Although injurious falsehood may be viewed as an interference tort, it is relatively narrow in scope and will not be discussed in this article. See generally Lynn, *Injurious Falsehood*, 52 FLA. B.J. 360 (1978) (discussing the origin of the tort, the elements of a cause of action, the basis of liability, the defenses, and the scope of relief); Comment, *The Law of Commercial Disparagement: Business Defamation's Impotent Ally*, 63 YALE L.J. 65, 104 (1953) (characterizing the tort as “trade libel” and recommending “intelligent use of the injunction” to rejuvenate this tort).

8. These torts are considered “economic” or “dignitary” torts as distinguished from those that result in physical injury. Some acts which may serve as the basis for interference with prospective advantage claims are more properly classified as “unfair competition.” Unfair competition may be carried out by interferences such as harassment, boycott, or disparagement. It is more commonly associated with false advertising, misappropriation, “passing-off” and fraud. Unfair competition, representing a distinct area of law, is beyond the scope of this article. For discussions of unfair competition, see 2 R. CALLMAN, *THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES* §§ 9.01-9.20 (4th ed. 1982) [hereinafter cited as CALLMAN]; Bunn, *The National Law of Unfair Competition*, 62 HARV. L. REV. 987 (1949); Craswell, *Identification of Unfair Acts and Practices by the Federal Trade Commission*, 1981 WIS. L. REV. 107; Handler, *Unfair Competition*, 21 IOWA L. REV. 175 (1936).

9. A party can interfere with the formation of a contract by providing inaccurate information, thus depriving the plaintiff of expected profit. See, e.g., *Doyle v. Chatham & Phenix Nat'l Bank*, 253 N.Y. 369, 171 N.E. 574 (1930) (trustee falsely certified existence of securities which plaintiff relied on as collateral for his investment). Interference with an existing trade relationship was first recognized by the courts when defendants lured away plaintiffs' servants, thus depriving the plaintiffs of personal services. *Dobbs, Tortious Interference, supra* note 2, at 336. The tort moved beyond this limited relationship in *Lumley v. Gye*, 2 EL. & BL. 216, 118 Eng. Rep. 749 (1853) (defendant convinced noted singer to break her exclusive contract with plaintiff theatre owner and was held liable for malicious procurement of a breach of contract, even though the relationship was not strictly that of master and servant). Around the turn of the century, American courts began recognizing interference with expected contrac-

ships include contracts and expectations of financial advantage. These expectations include those derived from consummated dealings between individuals and those between an individual and others who may transact business with that individual in the future. Consequently, injured plaintiffs may recover for interference with existing and prospective contractual relationships.

The right to enter into and perform lawful contracts was guaranteed at common law.<sup>10</sup> Accordingly, liability has been found for inducing a party to break an existing contract and for committing tortious acts rendering contractual performance impossible.<sup>11</sup> Moreover, courts have protected the rights of persons to engage in their chosen livelihood.<sup>12</sup> Generally, no person may wrongfully interfere, either directly or indirectly, in the conduct of another's lawful business, trade, or profession.<sup>13</sup> Individuals have the right to work or invest capital as they choose and they cannot be compelled to act in a manner which they regard as contrary to their best interests.<sup>14</sup> Anyone who

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tual performance, *see* *Raymond v. Yarrington*, 96 Tex. 443, 73 S.W. 800 (1903), and interference by defendant which forced plaintiff to buy elsewhere at a higher price, thus depriving plaintiff of expected profit, *see* *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 107 Md. 556, 69 A. 405 (1908). For a discussion of these historical developments, *see* Green, pt. II, *supra* note 6, at 8-15.

10. PROSSER, *supra* note 2, § 129, at 915. *See generally* Note, *Intentional Interference with Business Relations*, 3 RUTGERS L. REV. 277 (1949) (tortious interference with contract is based upon protection of established business relations and contacts which, if combined, become protectable property rights as distinguished from possessory and title rights).

11. *E.g.*, *Blivas and Page, Inc. v. Klein*, 5 Ill. App. 3d 280, 282 N.E.2d 210 (2d Dist. 1972) (interference with oral contractual relationship between plaintiff and an architectural firm on a certain housing project held actionable); *Krauter v. Adler*, 328 Ill. App. 127, 65 N.E.2d 215 (1st Dist. 1946) (dissolution of corporation to escape performance of its contract to pay broker's commission held actionable).

12. *See, e.g.*, *Allain v. National R.R. Adjustment Bd.*, 120 F. Supp. 453 (N.D. Ill. 1953) (plaintiffs, employed as "lounge attendants" by railroad, had the right to be free from unlawful interference with their employment by persons other than the railroad), *aff'd sub nom.* *Allain v. Tummon*, 212 F.2d 32 (7th Cir. 1954); *Colucci v. Chicago Crime Comm'n*, 31 Ill. App. 3d 802, 334 N.E.2d 461 (1st Dist. 1975) (use of allegedly false and defamatory reasons to not do business with plaintiff was actionable as tort of interference with prospective economic advantage); *City of Rock Falls v. Chicago Title & Trust Co.*, 13 Ill. App. 3d 359, 300 N.E.2d 331 (3d Dist. 1973) (cause of action based on interference with property owner's utilization of his property found to be adequately stated by recitation of application refusals, misstatements and threats made by city officials).

13. *See, e.g.*, *Robinson v. Lull*, 145 F. Supp. 134 (N.D. Ill. 1956) (court upheld doctor's claim of intentional interference by medical association which damaged his practice and which was based on association's reaction to his disapproval of its alleged monopoly of contract medicine); *Colucci v. Chicago Crime Comm'n*, 31 Ill. App. 3d 802, 334 N.E.2d 461 (1st Dist. 1975).

14. *See, e.g.*, *Carlson v. Carpenter Contractors' Ass'n*, 305 Ill. 331, 137 N.E. 222 (1922) (union carpenter entitled to damages from contractors' association which persuaded dealers to cease selling materials to union men or those employing union men, thus preventing carpenter's employment); *Purington v. Hinchliff*, 219 Ill. 159, 76 N.E. 47 (1905) (boycott of brick manufacturer by bricklayers' union and builders' and brick manufacturers' associations held illegal when done with intent to injure brick manufacturer's business); *Candalaus Chicago, Inc. v. Evans Mill Supply Co.*, 51 Ill. App. 3d 38, 366 N.E.2d 319 (1st Dist. 1972) (manufacturer of paper products had the right to bypass its jobber and sell to jobber's customer); *Bruce v. Ferrara*, 107 Ill. App. 2d 272, 246 N.E.2d 874 (1st Dist. 1969) (in absence of restrictive covenant, unfair

infringes on any of these rights has committed an actionable wrong.<sup>15</sup> The rationale underlying this rule is that the law establishes the limits of free competition. Although competition may be waged aggressively, when a competitor exceeds the reasonable parameters of free competition, thereby causing loss to another, the law will redress this injury.<sup>16</sup> The continuum of

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competition was not shown by a company which alleged minimal loss and attempted to enjoin a previous employee from using its customer lists or soliciting its customers). As the Illinois Supreme Court stated in *Carlson*:

No persons, individually or by combination, have the right to directly or indirectly interfere with or disturb another in his lawful business or occupation or for the sake of compelling him to do some act which in his own judgment his own interest does not require. Losses willfully caused by another from motives of malice to one who seeks to exercise and enjoy the fruits and advantages of his own enterprise, industry, skill or credit will sustain an action.

*Carlson v. Carpenters' Contractors' Ass'n*, 305 Ill. 331, 338, 137 N.E. 222, 224 (1922).

15. The Restatement (Second) of Torts sets forth the general principle that:

One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

RESTATEMENT (SECOND) OF TORTS § 766 (1977). The Restatement also adopts the principle that:

[O]ne who intentionally and improperly interferes with another's prospective contractual relation . . . is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.

*Id.* § 766B.

Of course, "[e]very business offering its product or service for sale 'interferes' in some sense with its competitor's similar offering. Such interference, however, is not the primary intent but only incidental to the intent to compete; this may be characterized as lawful or permissible incidental interference. . . ." CALLMAN, *supra* note 8, § 9.01, at 5. Relief has been granted in cases in which "the intruder was chargeable with some anticompetitive conduct, over and above his mere knowledge of the underlying contract. Whether a plaintiff would be granted relief against 'tortious' interference by a defendant who committed no such act, and only had knowledge of the underlying contract, is open to doubt." *Id.* § 9.01, at 6 (citing *Continental Research, Inc. v. Cruttenden, Podesta & Miller*, 222 F. Supp. 190 (D. Minn. 1963)). *Continental Research* provides an extensive discussion of the interference tort. The court concludes, "[t]he cornerstone of the tort may very well not be the motive with which the person sought to be charged has acted, but the Minnesota decisions do seem reconcilable on that basis." 222 F. Supp. at 220.

16. The courts have generously defined "reasonable competition" to include competition "carried on for the purpose of gain, even to the extent of intending to drive from business [the competitor] and actually accomplishing that result . . . unless there was actual malice." *Doremus v. Hennessey*, 176 Ill. 608, 615, 52 N.E. 924, 926 (1898). See *infra* notes 53-54 and accompanying text. See generally 45 AM. JUR. 2D *Interference* § 31 (1969) (competition is justified, even if morally questionable, if it is to further one's own interests and is carried on by lawful means); 86 C.J.S. *Torts* §§ 43-44 (1954) (lawful competition is not actionable even though carried to the extent of ruining a rival); Estes, *Expanding Horizons in the Law of Torts—Tortious Interference*, 23 DRAKE L. REV. 341 (1974) (privilege of competition, which may be an affirmative defense, comes from the value placed on free enterprise in America; however, if an existing contract is disturbed, the defense of competition may not be enough

behavior, ranging from ethical competition to unlawful interference, is determined by the courts according to the prevailing ethical standards of the community.<sup>17</sup>

In commercial dealings, the tort of interference consists primarily of two related but distinct causes of action: interference with contract and interference with prospective advantage. The fundamental distinction between these two actions lies in the degree of protection each of them affords.<sup>18</sup> This distinction evolves in part from the different points in time at which the claims arise: the action for interference with contractual relations protects contracts that are already in existence, while the action for interference with prospective advantage protects future contractual dealings.

Much of the confusion surrounding these two causes of action stems from the various characterizations given to them by the courts. For example, Illinois courts have described interference with contract cases as "interference with business relationships,"<sup>19</sup> "tortious interference with contractual and business relationships,"<sup>20</sup> and "malicious interference with contractual rights."<sup>21</sup> Courts have discussed the action for interference with prospective advantage in terms of interference with "valuable business relationship[s],"<sup>22</sup> interference with "business interests,"<sup>23</sup> "tortious interference with business

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to avoid liability).

In the area of sports law, for instance, when a player "jumps" his contract, the player's original team may seek either injunctive relief or money damages under the interference tort. The courts have allowed this tort,

only when the interference is found to be 'improper,' a term which represents the court's conclusion that the third party's actions have surpassed the level of intrusion which must be tolerated in order to preserve a healthy level of economic competition for the player's service. It is clear that some degree of infringement must be accepted by the existing employer. . . . [For example,] the original employer will not be allowed to prevent his employee-athlete from entering into contracts to be performed in the future.

J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* § 4.14, at 399 (1979); see also *Missouri v. National Org. for Women*, 620 F.2d 1301, 1317-19 (8th Cir.), cert. denied, 449 U.S. 842 (1980) (because of its first amendment protections, NOW was not liable for tortious interference for its boycott of Missouri businesses after the state failed to pass the equal rights amendment).

17. See *City of Rock Falls v. Chicago Title & Trust Co.*, 13 Ill. App. 3d 359, 300 N.E.2d 331 (3d Dist. 1973). The court suggested that a comparison be made of the defendant's allegedly tortious conduct with "the behavior of fair men similarly situated, [and] that the line of demarcation between permissible behavior and interference reflect[ed] the ethical standards of the community." *Id.* at 362-63, 300 N.E.2d at 333 (citing 45 AM. JUR. 2d, *Interference* § 31); accord *Panther v. Marshall Field & Co.*, 646 F.2d 271, 298 (7th Cir. 1981). See generally Note, *Interference with Contractual Relations: A Property Limitation*, 18 STAN. L. REV. 1406 (1966) (in determining whether to allow a cause of action for tortious interference with contractual relations, the court should utilize older tort theories, such as misappropriation, in its analysis).

18. See *infra* notes 59-64 and accompanying text.

19. *Candalas Chicago, Inc. v. Evans Mill Supply Co.*, 51 Ill. App. 3d 38, 366 N.E.2d 319 (1st Dist. 1977).

20. *Thorne v. Elmore*, 79 Ill. App. 3d 333, 398 N.E.2d 837 (1st Dist. 1980).

21. *Herman v. Prudence Mut. Casualty Co.*, 41 Ill. 2d 468, 244 N.E.2d 809 (1969).

22. *Midway Oil Co. v. Cities Serv. Oil Co.*, 49 F.R.D. 273, 274 (N.D. Ill. 1970).

23. *Polytechnic Data Corp. v. Xerox Corp.*, 362 F. Supp. 1, 10 (N.D. Ill. 1973).

relationships,"<sup>24</sup> and "wrongful invasion of plaintiff's right to establish and conduct a lawful business."<sup>25</sup> Recent cases have referred to interference with prospective advantage in terms of "interference with prospective economic opportunity"<sup>26</sup> and "unjustifiable interference with . . . commercial operations."<sup>27</sup>

#### HISTORICAL UNDERPINNINGS

The roots of the interference torts can be traced back to Roman law<sup>28</sup> and early common law.<sup>29</sup> In the early cases, liability was limited to situations in which the interference consisted of a separate, independent tort.<sup>30</sup> For example, when a tortfeasor injured a master's servant, the master could recover in interference based upon the battery committed to his servant.<sup>31</sup> The rationale for this result was that the master had been deprived of the servant's services due to the battery. Accordingly, the scope of liability did not expand, because the master's recovery could be no greater than the recovery of the servant suing on his behalf. The servant was only indirectly compensated through the recovery of his master.<sup>32</sup>

During the nineteenth century, several cases firmly established the imposition of liability for tortious interference with contract.<sup>33</sup> By recognizing this

24. *National Educ. Advertising v. Cass Student Advertising, Inc.*, 454 F. Supp. 71, 73 (N.D. Ill. 1977).

25. *Robinson v. Lull*, 145 F. Supp. 134, 138 (N.D. Ill. 1956).

26. *DP Services, Inc. v. AM Int'l*, 508 F. Supp. 162, 168 (N.D. Ill. 1981).

27. *Streif v. Bovinette*, 88 Ill. App. 3d 1079, 411 N.E.2d 341 (5th Dist. 1980); *see also Bank Computer Network Corp. v. Continental Ill. Nat'l Bank*, 110 Ill. App. 3d 492, 442 N.E.2d 586 (1st Dist. 1982) (interference with prospective economic advantage).

28. *See Sayre, Inducing Breach of Contract*, 36 HARV. L. REV. 663 (1923) [hereinafter cited as Sayre]. Professor Sayre stated:

In early Roman law, the *paterfamilias*, as head of the Roman household of relatives, dependents, and slaves, was the responsible person who was entitled to bring the *actio iniuriarum* for violence committed upon or insults offered to his wife, children, slaves, or other members of his household; in truth an insult to a member of his household was only another form of insult to the *paterfamilias* himself.

*Id.* at 663; *see also Wigmore, Interference with Social Relations*, 21 AM. L. REV. 764 (1887) (discussion of the historical development of tortious interference liability) [hereinafter cited as Wigmore].

29. *See, e.g., Lumley v. Gye*, 2 E1. & B1. 216, 118 Eng. Rep. 749 (1853) (one of the first common law interference decisions); *see also Sayre, supra* note 28, at 663-65; Wigmore, *supra* note 28, *passim*.

30. *See Dobbs, Tortious Interference, supra* note 2, at 338.

31. *See Sayre, supra* note 28, at 663-64; Wigmore, *supra* note 28, at 765 (actions by a master for injury to his servant existed as early as the reign of Henry III (1216-1272)).

32. Dobbs, *Tortious Interference, supra* note 2, at 339. Early case law was extended partially by decisions which held that a husband could recover if the defendant "beat and injured" his wife. The rationale was similar to that of the master/servant cases, because the husband had a continuing duty to support his wife, even if her injury interfered with her ability to provide services. Similarly, just as the master could not replace his injured servant because of the requirements of the apprenticeship system, "the husband could not go into the market and obtain a replacement." *Id.* (citing *Hyde v. Scysson*, 79 Eng. Rep. 462 (1620)).

33. *See, e.g., Temperton v. Russell*, 1 Q.B. 715 (1893); *Bowen v. Hall*, 6 Q.B.D. 333 (1881);



cause of action, the scope of liability, which had been limited previously to loss resulting from violence to servants, was extended judicially to include loss resulting from the mere enticement of employees to change jobs.<sup>34</sup> Consequently, some courts eliminated the requirement that an independent tortious act support the claim of interference. Although the early cases frequently dealt with interference in commercial settings, similar developments took place in several noncommercial contexts.<sup>35</sup>

Interference with prospective advantage also was recognized at an early date;<sup>36</sup> however, this area of law has developed primarily in the twentieth century.<sup>37</sup> As with the early interference with contract cases, the prospective advantage decisions were limited at first by the requirement of an independent tortious act.<sup>38</sup> In these decisions, the use or threat of violence had resulted

Lumley v. Gye, 2 El. & Bl. 216, 118 Eng. Rep. 749 (1853); see also Carpenter, *Interference with Contract Relations*, 41 HARV. L. REV. 728 (1928); Note, *Tortious Interference with Contract: A Reassertion of Society's Interest in Commercial Stability and Contractual Integrity*, 81 COLUM. L. REV. 1491 (1981) [hereinafter cited as Note, *Tortious Interference*]. The rationales set forth in the early cases for imposing tortious interference liability underlie much of modern interference law. *Id.* at 1494.

34. This extension seemed justified by the labor shortage brought on by the severe plague of the early fourteenth century. Statutes forbade workers to leave their employment and forbade other employers from hiring them. The tort gradually expanded beyond this statutory limit, so that it became "a tort to entice a laborer from his hire." Dobbs, *Tortious Interference*, *supra* note 2, at 340 & nn.27-28.

35. *Id.* at 340-41. For example, actions for "alienation of affections" or "criminal conversation" can be maintained in the absence of a separate tortious act. In other words, the mere enticement of a wife to leave her husband or commit adultery is actionable.

36. See PROSSER, *supra* note 2, § 130, at 949 (citing Y.B. 9 Hen. VII 7 (1494); Y.B. 11 Hen. IV 47 (1410)) (discussing the recognition of a writ which created a right of action for tenants at will who were threatened and, therefore, departed).

37. In the first modern case to find liability for interference with prospective advantages, a builder sued members of a trade union who had interfered with his present and future contracts to supply building materials to other firms. The court refused to limit the action to cases of master and servant or personal service and, further, would not distinguish between claims for inducing persons to break existing contracts and claims for inducing persons not to enter into contracts. In so holding, the court stated:

There was the same wrongful intent in both cases, wrongful because malicious. There was the same kind of injury to the plaintiff. It seems rather a fine distinction to say that, where a defendant maliciously induces a person not to carry out a contract already made with the plaintiff and so injures the plaintiff, it is actionable, but where he injures the plaintiff by maliciously preventing a person from entering into a contract with the plaintiff, which he would otherwise have entered into, it is not actionable.

Temperton v. Russell, 1 Q.B. 715, 728 (1893).

38. See Wigmore, *The Boycott and Kindred Practices as Ground for Damages*, 21 AM. L. REV. 509 (1887). Wigmore distinguished between interference with customers through acts of persuasion not fraudulent or slanderous (not actionable) and acts of fraud, slander, violence or nuisance (actionable). *Id.* at 514-15. The distinction protects those involved in ordinary commerce, because "coercion . . . is one of the every-day instruments of commercial dealings. . . . It is not the fact of a coercion that is important, but the nature of its cause." *Id.* at 526-27 (emphasis in original). To permit liability based on a "coercive" act, but not on a

in an interference with the plaintiff's business.<sup>39</sup> Later cases were of a similar nature, such as one in which a defendant had used improper means to distract prospective employees or customers.<sup>40</sup> As in the contract cases, the courts also allowed recovery for the loss of a prospective advantage when a person wrongfully interfered with the plaintiff's profession.<sup>41</sup> Hence, the development of the interference torts generally was parallel,<sup>42</sup> and liability gradually expanded under both theories to include situations outside the commercial context. Several distinct doctrines emerged from this development, including commercial disparagement, alienation of affection, and criminal conversation.<sup>43</sup>

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"persuasive" one, would allow too much discretion to the jury when the difference between the actions is only relative. "[F]rom one point of view all persuasion may be regarded as coercion, while from another all coercion may be regarded as persuasion." *Id.* at 528. Liability based on threats of unlawful acts, on the other hand, provides a "clear and definite" distinction, "easily apprehended, and . . . fair not only as among all classes of defendants, but also—which is equally important—as between their liberties and the plaintiff's rights." *Id.* at 529; see also Wigmore, *supra* note 28.

39. See *Carrington v. Taylor*, 11 East 571, 103 Eng. Rep. 1126, 1127 (1809). In *Carrington*, the plaintiff made a living from the sale of wild fowl attracted to his decoy. Another hunters shooting of game near the decoy was held to be actionable as a "wilful disturbance." In refusing to set aside the jury verdict in favor of the plaintiff, the court relied on *Keble v. Hickringill*, 11 Mod. 74, 88 Eng. Rep. 898 (1706). *Carrington*, 103 Eng. Rep. at 1127 n.(a).

40. See, e.g., *Tarleton v. McGawley*, Peake 270, 170 Eng. Rep. 153 (1793); *Garret v. Taylor*, Cro. Jac. 567, 79 Eng. Rep. 485 (1621).

41. See, e.g., *Temperton v. Russell*, 1 Q.B. 715 (1893) (union held liable after inducing suppliers of building materials to breach existing contracts with plaintiff and to not enter into further contracts with him); *Gregory v. Duke of Brunswick*, 134 Eng. Rep. 866 (1843) (defendant who caused actor to be hissed off the stage held liable for interfering with his employment); see also Basak, *Principles of Liability for Interference with Trade, Profession or Calling*, 27 LAW Q. REV. 290, 312 (1911) (difficulty in analyzing interference with profession "may be solved by the recognition of freedom of mind and action as a legal right and its application to cases of interference with trade").

42. PROSSER, *supra* note 2, § 130, at 949-50. As economic life became more complex, the courts recognized the need to protect individuals' reasonable expectations from wrongful interference. One court stated, "the notion is intolerable that a man should be protected by the law in the enjoyment of property once it is acquired, but left unprotected by the law in his effort to acquire it." *Brennan v. United Hatters of N. Am.*, 73 N.J.L. 729, 742, 65 A. 165, 171 (1906). Most of the expectancies protected by the courts were those based on the likelihood of obtaining employment, *Huskie v. Griffin*, 75 N.H. 345, 74 A. 595 (1909); or of securing employees, *Jersey City Printing Co. v. Cassidy*, 63 N.J. Eq. 759, 53 A. 230 (1902); or of obtaining customers, *Tuttle v. Buck*, 107 Minn. 145, 119 N.W. 946 (1909). Courts, familiar with ascertainment of damages in breach of contract cases, could use this experience to determine a plaintiff's loss due to interference with a prospective contract. They were less likely to find liability (and damages) for interference with noncontractual relations, e.g., expulsion from a voluntary fraternal organization, *Trautwein v. Harbourt*, 40 N.J. Super. 247, 123 A.2d 30 (1956); or for deprivation of the chance to win a contest, *Collatz v. Fox Wis. Amusement Corp.*, 239 Wis. 156, 300 N.W. 162 (1941). In these latter types of actions plaintiffs frequently lost because the courts thought it was too uncertain that the benefits would have accrued to the plaintiff. PROSSER, *supra* note 2, § 129, at 950.

43. See generally Dobbs, *Tortious Interference*, *supra* note 2, at 341-42.

## MODERN APPROACHES

Today, tortious interference with contract is a recognized cause of action in all American jurisdictions.<sup>44</sup> The tort of interference with prospective advantage, however, receives mixed reviews. There are two widely divergent views on this subject: the "property limitation" or "New York approach," and the "California approach."<sup>45</sup> Most jurisdictions, including Illinois, have adopted a view which falls somewhere between these two extremes.

By analogizing to the tort of trespass, the New York courts traditionally characterized the tort of interference as an obstruction of the property rights of the plaintiff.<sup>46</sup> As a result, the plaintiff's recovery had to be grounded on a property right, such as an existing contract. New York courts have continued to apply this early analysis. Consequently, under the New York approach, claims of interference with economic expectancies or prospective advantages are denied because these are not viewed as protectable property rights.<sup>47</sup>

In contrast, the California courts traditionally did not view an action for the tort of interference as a means of safeguarding property rights.<sup>48</sup> Rather, these courts focused on the protection of certain relational interests. As a result, California recognizes a prospective advantage as a protectable interest. In fact, California recently has gone so far as to recognize a cause of action for negligent interference with prospective advantage, thereby becoming the first American jurisdiction to do so.<sup>49</sup>

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44. See generally PROSSER, *supra* note 2, § 130 (despite some courts' reluctance to accept the doctrine of tortious interference with contract in its early days, the tort is now recognized everywhere and applies to any contract, regardless of its nature).

45. See generally Note, *Tortious Interference*, *supra* note 33 (discussing New York and California approaches, and suggesting limitations on tortious interference liability).

46. *Id.* at 1501-04.

47. See *Guard-Life Corp. v. S. Parker Hardware Corp.*, 50 N.Y.2d 183, 406 N.E.2d 445, 428 N.Y.S.2d 628 (1980). The New York Court of Appeals relied on Restatement (Second) of Torts § 766 (1979), and found enforceable contracts protected against any kind of intentional interference, but prospective contracts protected only from violent, fraudulent or other wrongful interference. Thus, "[w]ithout legally enforceable contract rights a plaintiff [in New York] has no possible action against an interferer using non-tortious means." Note, *Tortious Interference*, *supra* note 33, at 1504 n.95.

48. See *Buckaloo v. Johnson*, 14 Cal. 3d 815, 827, 537 P.2d 865, 872, 122 Cal. Rptr. 745, 752 (1975) (all advantageous relations are protected, whether or not they have "attained the dignity of a legally enforceable agreement"). One commentator has pointed out that California's view of the kind of interests which deserve tort protection has expanded over the past 40 years. Note, *Tortious Interference*, *supra* note 33, at 1505 & nn.98-100. In 1941, Judge Traynor wrote that "[c]ompetitive freedom . . . is of sufficient importance to justify one competitor in inducing a third party to forsake another competitor if no contractual relationship exists between the two." *Imperial Ice Co. v. Rossier*, 18 Cal. 2d 33, 36, 112 P.2d 631, 633 (1941) (dictum). In 1975, a California court protected all existing or future advantageous relations. *Buckaloo*, 14 Cal. 3d at 815, 537 P.2d at 865, 122 Cal. Rptr. at 745. Most recently, a California court protected all areas of foreseeable harm from interference. *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 598 P.2d 60, 157 Cal. Rptr. 407 (1979).

49. See *J'Aire Corp. v. Gregory*, 24 Cal. 3d at 808, 598 P.2d at 66, 157 Cal. Rptr. at

The Illinois approach to the interference torts falls somewhere between the restrictive New York approach and the liberal California approach. Unlike New York, Illinois recognizes both intentional interference with contract or contractual relations and intentional interference with prospective advantage.<sup>50</sup> Illinois courts also have recognized a cause of action for negligent interference with contract,<sup>51</sup> but have been unwilling to follow the California courts in recognizing a cause of action for negligent interference with prospective advantage.<sup>52</sup>

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412 (contractor held to have "duty of care to tenant of a building undergoing construction work to prosecute that work in a manner which does not cause undue injury to the tenant's business where such injury is reasonably foreseeable").

50. See, e.g., *Blockman v. Sandalwood Apartments*, 613 F.2d 169 (7th Cir. 1980); *Republic Gear Co. v. Borg-Warner Corp.*, 406 F.2d 57 (7th Cir.), cert. denied, 394 U.S. 1000 (1969); *Swager v. Couri*, 77 Ill. 3d 173, 395 N.E.2d 921 (1979); *Ramsey v. Greenwald*, 91 Ill. App. 3d 855, 414 N.E.2d 1266 (2d Dist. 1980); *Michigan Ave. Nat'l Bank v. State Farm Ins. Co.*, 83 Ill. App. 3d 507, 404 N.E.2d 426 (1st Dist. 1980); *Bolger v. Danley Lumber, Inc.*, 77 Ill. App. 3d 297, 395 N.E.2d 1066 (1st Dist. 1979); *O'Fallon Dev. Co. v. City of O'Fallon*, 43 Ill. App. 3d 348, 356 N.E.2d 1293 (5th Dist. 1976); *Parkway Bank & Trust Co. v. City of Darien*, 43 Ill. App. 3d 400, 357 N.E.2d 211 (2d Dist. 1976); *Farley v. Kissel Co.*, 18 Ill. App. 3d 139, 310 N.E.2d 385 (1st Dist. 1974); *Bergfield v. Stork*, 7 Ill. App. 3d 486, 288 N.E.2d 15 (5th Dist. 1972); *Blivas & Page, Inc. v. Klein*, 5 Ill. App. 3d 280, 282 N.E.2d 210 (2d Dist. 1972); *Worrick v. Flora*, 133 Ill. App. 2d 755, 372 N.E.2d 708 (3d Dist. 1971).

Some Illinois courts apply a property limitation approach. See, e.g., *Carlson v. Carpenter Contractors' Ass'n*, 305 Ill. 331, 338, 137 N.E. 222, 224 (1922) (plaintiffs entitled to protection from willful interference with their rights "to exercise and enjoy the fruits and advantages of [their] own industry, skill or credit"); *Belden Corp. v. Internorth, Inc.*, 90 Ill. App. 3d 547, 552, 413 N.E.2d 98, 101 (1st Dist. 1980) ("plaintiff must have a reasonable expectancy of entering a valid business relationship, and defendant must purposely interfere and defeat this legitimate expectancy, thereby causing harm to the plaintiff"); *Parkway Bank & Trust Co. v. City of Darien*, 43 Ill. App. 3d 400, 402-03, 357 N.E.2d 211, 213-14 (2d Dist. 1976) (although an action for interference with prospective business advantage does not require the existence of an enforceable contract, plaintiff's complaint, which failed to allege any business relations with third parties, was insufficient to maintain an action for tortious interference following defendant's rezoning of tract of land plaintiff intended to develop); *Krauteer v. Adler*, 328 Ill. App. 127, 65 N.E.2d 215 (1st Dist. 1946) (abstract opinion) (plaintiff had property right in contract for broker's fees with corporation and could recover for injury sustained as result of dissolution).

51. See *American Transp. Co. v. U.S. Sanitary Specialties Corp.*, 2 Ill. App. 2d 144, 118 N.E.2d 793 (1st Dist. 1954). The court reasoned that, if one could be held liable for negligent interference with property interests, there was no reason to disallow liability for negligent interference with "contract interests [which] have often been treated as property." *Id.* at 152-53, 118 N.E.2d at 797 (quoting with approval Carpenter, *Elements of the Tort of Interference with Contractual Relations*, 41 HARV. L. REV. 728, 732 (1928)).

52. See *O'Brien v. State St. Bank & Trust Co.*, 82 Ill. App. 3d 833, 401 N.E.2d 1356 (4th Dist. 1980). Justice Craven stated that, in not recognizing such a cause of action, Illinois was among "the majority of jurisdictions." *Id.* at 85, 401 N.E.2d at 1357; see, e.g., *Ethyl Corp. v. Balter*, 386 So. 2d 1220, 1224 (Fla. Dist. Ct. App. 1980) (plaintiff did not prove direct interference by defendant, who was held not liable for either negligent or consequential interference). But see, e.g., Note, *Negligent Interference with Economic Expectancy: The Case for Recovery*, 16 STAN. L. REV. 664 (1964) (recovery for negligent interference with contractual and prospective business advantage should be allowed if the elements of negligence are proven satisfactorily and if recovery is indicated by balancing the interests in favor of recovery).

## THE ILLINOIS APPROACH

A. *Elements of the Tort*

Illinois first recognized intentional interference with contract and intentional interference with prospective advantage in 1895, in *Doremus v. Hennessey*.<sup>53</sup> Modern definitions of the interference torts by Illinois courts closely parallel the standards established in *Doremus*.<sup>54</sup> The traditional elements of interference with contract are: (1) the existence of a contract between the plaintiff and a third party; (2) the defendant's knowledge of the contract; (3) an intentional unjustified inducement to breach the contract; (4) a subsequent breach by the third party; and (5) damage to the plaintiff as a result of the breach.<sup>55</sup> The essential elements of tortious interference with prospective advantage are: (1) the plaintiff's reasonable expectancy of entering into a valid business relationship; (2) the defendant's knowledge of the expectancy; (3) an intentional interference by the defend-

53. 176 Ill. 608, 52 N.E. 924 (1898). In *Doremus*, the defendants were held liable for \$6,000 in damages to a laundry owner's business. The laundry owner had refused to increase her prices to those charged by the Chicago Laundrymen's Association, whereupon defendants, through use of "intimidation . . . and unlawful inducements," *id.* at 612, 52 N.E. at 925, caused breaches of contract and induced others not to take her work. The court held this interference an actionable wrong, not lawful competition, because the defendants acted with "intent to do a wrongful harm and injury," i.e., with malice. *Id.* at 615, 52 N.E. at 926. The Illinois Supreme Court found this holding to be supported by English and American precedents, *id.* at 615-16, 52 N.E. at 926, stating:

Every man has a right, under the law, as between himself and others, to full freedom in disposing of his own labor and capital according to his own will, and any one who invades that right without lawful cause or justification commits a legal wrong; and, if followed by an injury caused in consequence thereof, the one whose right is thus invaded has a legal ground of action for such wrong.

*Id.* at 615, 52 N.E. at 926.

54. See *Schott v. Glover*, 109 Ill. App. 3d 230, 236, 440 N.E.2d 376, 380 (1st Dist. 1982). In *Schott*, the court stated that business expectancy has "less protection than the right to receive the benefits of a contract." Thus, defendant's conditional privilege as codefendant's attorney was held to be "even more likely to be privileged where no contract is involved," and plaintiff's complaint which failed "to allege facts which would constitute actual malice" did not "state a cause of action for tortious interference with a business expectancy." *Id.* As stated by the appellate court in *Blivas & Page*:

[T]he theory of the action as announced in *Lumley v. Gye* [2 El. & Bl. 216, 118 Eng. Rep. 749 (1853)] has been repeatedly reaffirmed in this State and is in conformity with Section 766 of the Restatement of the Law of Torts. In this Court's opinion an intentional knowing act committed by a third party without justification or excuse causing the breach of a contract constitutes an actionable tort.

5 Ill. App. 3d 280, 285, 282 N.E. 2d 210, 214 (2d Dist. 1972) (citing *Herman v. Prudence Mut. Casualty*, 41 Ill. 2d 468, 244 N.E.2d 809 (1969)).

55. See *Hannigan v. Sears, Roebuck & Co.*, 410 F.2d 285, 291 (7th Cir.), *cert. denied*, 396 U.S. 902 (1969); *Candalaus Chicago, Inc. v. Evans Mill Supply Co.*, 51 Ill. App. 3d 38, 47, 366 N.E.2d 319, 326 (1st Dist. 1977). See generally *Developments in the Law—Competitive Torts*, 77 HARV. L. REV. 888, 959-69 (1964) (to establish a cause of action for tortious interference with contractual relations, the plaintiff must show the defendant's knowledge and intent, improper affirmative conduct by defendant, and resulting damage).

ant; (4) a failure of the expectancy to become a valid business relationship; and (5) damages to the plaintiff.<sup>56</sup>

Due to the similarities between the interference torts, some Illinois decisions have set forth a common definition of the two actions, treating them as one. The elements of this hybrid interference action are: (1) the existence of a valid business relationship or expectancy; (2) knowledge of the relationship or expectancy on the part of the interferer; (3) an intentional interference;<sup>57</sup> (4) the inducement or causing of a breach or termination of the relationship or expectancy; and (5) resultant damage to the party whose relationship or expectancy has been disrupted.<sup>58</sup>

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56. See *Schott v. Glover*, 109 Ill. App. 3d 230, 235, 440 N.E.2d 376, 380 (1st Dist. 1982); *Tru-Link Fence Co. v. Reuben H. Donnelley Corp.*, 104 Ill. App. 3d 745, 751, 432 N.E.2d 1188, 1193 (1st Dist. 1982).

57. Some formulations of the interference torts require intentional and malicious interference as a necessary element. See, e.g., *Midway Oil Co. v. Cities Serv. Oil Co.*, 49 F.R.D. 273, (N.D. Ill. 1970). Gulf Oil Corporation allegedly provided Midway's customers and dealers with false information on product distribution and credit. In refusing to grant Gulf's motion for summary judgment, the court held that the element of malice was essential to the cause of action, and defined malice as the knowing commitment of an intentional act which unjustifiably violates the plaintiff's rights. *Id.* at 274. Summary judgment was inappropriate because the existence of malice was a material issue of fact for trial. In another case, a manufacturer sued to collect payment for goods sold to its distributor. The distributor counterclaimed for tortious interference with business relations based on the manufacturer's sale directly to the distributor's customers. The court held that the distributor failed to demonstrate that the manufacturer acted with malice, and defined malice as "not used in its popular sense of ill will or hatred, but in its legal sense as an intent to do wrongful harm and injury and without just cause." *Candalaus Chicago, Inc. v. Evans Mill Supply Co.*, 51 Ill. App. 3d 38, 48, 366 N.E.2d 319, 326 (1st Dist. 1977).

Because interference is a purposely caused tort, however, the element of intent must always be alleged and proved in order to maintain successfully a cause of action. See, e.g., *Republic Gear Co. v. Borg-Warner Corp.*, 406 F.2d 57, 61 (7th Cir.), *cert. denied*, 394 U.S. 1000 (1969) (under Illinois law, malice, meaning ill will toward plaintiff, is not essential to maintain a cause of action; however, it is necessary to allege that the defendant intended to induce the breach of contract); *Clifton-Strode, No. 2, Inc. v. Kent*, 110 Ill. App. 3d 525, 529, 442 N.E.2d 668, 669 (3d Dist. 1982) (malice will not be inferred when there is no evidence of an intentional wrong); *Tru-Link Fence Co. v. Reuben H. Donnelley Corp.*, 104 Ill. App. 3d 745, 432 N.E.2d 1188 (1st Dist. 1982) (court dismissed action because plaintiff failed to allege defendants' knowledge of plaintiff's business expectancy, or intentional action by defendants to interfere); *O'Fallon Dev. Co. v. City of O'Fallon*, 43 Ill. App. 3d 348, 358, 356 N.E.2d 1293, 1301 (5th Dist. 1976) (plaintiff failed to state cause of action for tortious interference with prospective business advantage for defendant's purchase and operation of a water tower with commercial logo of plaintiff's competitor because the complaint did not allege defendant's knowledge of plaintiff's business expectations); *Farley v. Kissel Co.*, 18 Ill. App. 3d 139, 147-48, 310 N.E.2d 385, 390 (1st Dist. 1974) (financial institution was not liable for lending funds to seller for land development, when seller was under contract to sell the land to plaintiff and subsequently revoked that contract, because defendant's conduct was unintentional, even though it might have caused the breach of contract); *accord Blivas & Page, Inc. v. Klein*, 5 Ill. App. 3d 280, 282 N.E.2d 210 (2d Dist. 1972); *Bergfield v. Stork*, 7 Ill. App. 3d 486, 288 N.E.2d 15 (5th Dist. 1972). Accordingly, the plaintiff must plead sufficient facts to indicate that the defendant's purpose was the alleged interference.

58. See *City of Rock Falls v. Chicago Title & Trust Co.*, 13 Ill. App. 3d 359, 300 N.E.2d 331 (3d Dist. 1973); *Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet*,

Generally, Illinois courts have required that there be an existing contract or prospective business relationship before a cause of action will lie.<sup>59</sup> The fact that the contract is terminable at will, however, does not bar recovery because courts often treat such contracts as subsisting relations until terminated.<sup>60</sup> Consequently, contracts that are terminable at will are presumed to remain in effect and, thus, are entitled to protection.<sup>61</sup> Defendants have been required to have knowledge of the existence of the contract or prospective business relationship and to have proximately caused the plaintiff's injuries.<sup>62</sup> Where the defendant intentionally or foreseeably causes an interference, the court will find his or her acts to be the proximate cause of the plaintiff's injuries.<sup>63</sup>

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Inc., 16 Ill. App. 3d 709, 306 N.E.2d 549 (1st Dist. 1974), *aff'd in part, rev'd in part*, 61 Ill. 2d 129, 334 N.E.2d 160 (1975). In *City of Rock Falls*, the court stated that one measure of damage is loss of possible income, and that protection from unjustified interference with business relations extends beyond contract liability. 13 Ill. App. 3d at 363, 300 N.E.2d at 333 (citing RESTATEMENT (SECOND) OF TORTS § 766 comment c, at 9 (1979)).

59. See, e.g., *J.E.L. Realtors, Inc. v. Mettile*, 111 Ill. App. 3d 987, 444 N.E.2d 750 (3d Dist. 1982) (contract provision which transferred liquor license from defendant to plaintiff in the event defendant ceased to operate a tavern on plaintiff's premises did not violate public policy since the municipality's code allowed such transfers; therefore, the contract was valid and plaintiff could maintain a cause of action for tortious interference against other defendants); *Loewenthal Sec. Co. v. White Paving Co.*, 351 Ill. 285, 298-99, 184 N.E. 310, 315 (1932) (contract between plaintiff and paving company did not include expectation that company would bid on sewer job; thus, construction company's bid for that job held not to interfere with an existing contractual relation).

60. See, e.g., *Kemper v. Worcester*, 106 Ill. App. 3d 121, 435 N.E.2d 827 (5th Dist. 1982) (court must focus on the defendant's interference with the contractual relationship, not on whether the employment agreement is enforceable between the plaintiff and his employer); *W.P. Iverson & Co. v. Dunham Mfg. Co.*, 18 Ill. App. 2d 404, 152 N.E.2d 615 (1st Dist. 1958) (interference action exists even though one party could terminate contract under certain conditions). *But cf.* *Ancraft Prod. Co. v. Universal Oil Co.*, 84 Ill. App. 3d 836, 844, 405 N.E.2d 1162, 1168 (1st Dist. 1980) ("In the absence of an express contract of employment and without malice [by the defendants], principles of free competition prevent liability to a subsequent employer."). See generally PROSSER, *supra* note 2, § 129, at 932-33.

61. See, e.g., *Getschow v. Commonwealth Edison Co.*, 110 Ill. App. 3d 522, 530, 444 N.E.2d 579, 584 (1st Dist. 1982) (court applied to a terminable at will contract the standards established for tortious interference with contractual relations, holding that to distinguish between conduct which directly effectuates a breach, and unjustifiable coercive conduct which causes the same result without a breach, would diminish the significance of the tort, leaving few legal restraints on competitors) (citing *Hannigan v. Sears, Roebuck & Co.*, 410 F.2d 285 (7th Cir.), *cert. denied*, 396 U.S. 902 (1969)). In *W.P. Iverson & Co. v. Dunham Mfg. Co.*, 18 Ill. App. 2d 404, 152 N.E.2d 615 (1st Dist. 1958), the court stated that "maliciously causing a breach of contract terminable at will is actionable. . . . [The] gist of the action is the malicious interference in the contractual relationship." *Id.* at 417, 152 N.E.2d at 621.

62. See *Belden Corp. v. Internorth, Inc.*, 90 Ill. App. 3d 547, 413 N.E.2d 98 (1st Dist. 1980); *Farley v. Kissell Co.*, 18 Ill. App. 3d 139, 310 N.E.2d 385 (1st Dist. 1974); *Northern Ins. Co. v. Doctor*, 23 Ill. App. 2d 225, 161 N.E.2d 867 (1st Dist. 1959).

63. The key concept in this finding is the intentional doing of a wrongful act without just cause. For cases holding this to be willful and malicious interference with a contractual relationship, see *Meadowmoor Dairies v. Drivers' Union*, 371 Ill. 377, 21 N.E.2d 308 (1939), *aff'd*, 312 U.S. 287 (1941); *Doremus v. Hennessey*, 176 Ill. 608, 52 N.E. 924 (1898); *W.P. Iverson & Co. v. Dunham Mfg. Co.*, 18 Ill. App. 2d 404, 152 N.E.2d 615 (1st Dist. 1958). It is important to distinguish between lawful and unlawful actions. Competition is lawful, even if it results

Although a cause of action for interference will lie for mere wrongful persuasion,<sup>64</sup> interference often is carried out by means of a wrongful act which in itself constitutes an independent tort.<sup>65</sup> For instance, interference may be effected by means of defamatory statements<sup>66</sup> or threats of violence.<sup>67</sup> In addition, an interference claim may lie when the defendant informs the plaintiff's employer of a debt,<sup>68</sup> or when the defendant's conduct constitutes a nuisance.<sup>69</sup> A claim for interference also may lie where a defendant interferes with the plaintiff's business by means of duress, which may be carried out through severe coercion or refusal to deal with the plaintiff.<sup>70</sup>

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in loss of property or personal service. Acts of fraud, misrepresentation, or intimidation resulting in loss are unlawful, particularly if undertaken for malicious motives. *Doremus*, 176 Ill. at 615, 52 N.E. at 926.

64. As used in interference cases, wrongful persuasion refers to enticement that is unlawful due to the absence of justification on the part of the interferor. See *supra* notes 30-34 and accompanying text.

65. See, e.g., *Colucci v. Chicago Crime Comm'n*, 31 Ill. App. 3d 802, 334 N.E.2d 461 (1st Dist. 1975) (interference consisted of alleged defamatory statement which gave rise to separate causes of action for libel and for tortious interference with prospective economic advantage); *City of Rock Falls v. Chicago Title & Trust Co.*, 13 Ill. App. 3d 359, 300 N.E.2d 331 (3d Dist. 1973) (city officials' refusals of building permit applications actionable for tortious interference and also actionable as misuse of public offices).

66. See, e.g., *Ramsey v. Greenwald*, 91 Ill. App. 3d 855, 863, 414 N.E.2d 1266, 1272 (2d Dist. 1980) (defendant is liable for tortious interference with contract, since his malicious defamation of fellow-employee was held to be unjustifiable conduct outside the scope of qualified privilege to act within his employer's best interests); *Colucci v. Chicago Crime Comm'n*, 31 Ill. App. 3d 802, 334 N.E.2d 461 (1st Dist. 1975) (cause of action for interference with prospective advantage not precluded because interference also was actionable as libel or slander); *Pendleton v. Time, Inc.*, 339 Ill. App. 188, 89 N.E.2d 435 (1st Dist. 1949) (the publication of a falsehood which damaged a renowned portrait painter's reputation and interfered with the property value of his work and his potential income was actionable under defamation law without a showing of special damages). In holding that the defamation publication also was actionable as a tortious interference with the plaintiff's livelihood, the *Pendleton* court stated that "[e]very man has a right, under the law . . . to full freedom in disposing of his own labor or capital . . . , and anyone who invades that right without lawful cause or justification commits a legal wrong. . . ." *Id.* at 195, 89 N.E.2d at 438 (quoting *Doremus v. Hennessey*, 176 Ill. 608, 615, 52 N.E. 924, 926 (1898)).

67. See, e.g., *Beaton v. Tarrant*, 102 Ill. App. 124 (1st Dist. 1902). In *Beaton*, striking union workers picketed their former employer's business. The strikers allegedly called the new employees "scabs and vile names" and threatened them with bodily injury. *Id.* at 126. The court concluded that this action constituted abusive picketing "calculated to intimidate a reasonable and prudent man," and issued an injunction to restrain this conduct. *Id.* at 129.

68. See, e.g., *Ammons v. Jet Credit Sales, Inc.*, 34 Ill. App. 2d 456, 181 N.E.2d 601 (1st Dist. 1962). In *Ammons*, a garnishment demand was served upon the plaintiff and her employer prior to entry of judgment against the plaintiff, who claimed that she was not indebted to the defendant sales company because the signature on the contract was a forgery. The plaintiff claimed malicious impairment of her credit and sought punitive and compensatory damages. The court recognized a cause of action, but disallowed the claim because the garnishment demand served on the plaintiff was void. *Id.* at 463-64, 181 N.E.2d at 604.

69. See, e.g., *Streif v. Bovinette*, 88 Ill. App. 3d 1079, 411 N.E.2d 341 (5th Dist. 1980) (repeated acts of harassment constituted nuisance and an interference with plaintiff's business).

70. See *Dalzell*, *Duress by Economic Pressure*, 20 N.C.L. REV. 237 (1942); *Dawson*, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947). See generally DOBBS, *HAND-BOOK*, *supra* note 3, § 10.2, at 653.



### B. Remedies

Interference actions often provide successful plaintiffs with remedies which traditionally have been reserved to either tort or contract actions.<sup>71</sup> Compensatory damages are limited only by the tort element of proximate cause.<sup>72</sup> Damages in contract cases usually have been limited by the rule that only damages within the contemplation of the parties are recoverable.<sup>73</sup> In Illinois, the general rule is that although punitive damages are not recoverable in contract actions,<sup>74</sup> they are recoverable in tort in the most compelling instances.<sup>75</sup>

In deciding interference cases, however, courts often have paid little attention to the distinctions between tort and contract remedies, ignoring the remedial limits imposed by these concepts. Consequently, plaintiffs in interference actions have been able to recover for consequential damages, loss of profits and punitive damages.<sup>76</sup> Punitive damages also have been awarded in tortious interference cases when the breach was effected by means of an independent, intentional tort.<sup>77</sup> Thus, when pleading a case involving an inducement to breach a contract, the practitioner should state, in separate

71. Remedies for breach of contract typically seek to give the plaintiff either the benefit of the bargain, or his expectation interest. Thus, a promisee may be able to recover the benefit of his contract as if it had not been breached. Alternatively, tort remedies attempt to compensate the plaintiff for his injuries or losses. The function of tort remedies is to return the plaintiff to his previous position, as if the tort had not been committed. *See generally* DOBBS, *HANDBOOK*, *supra* note 3, § 8, at 540.

72. PROSSER, *supra* note 2, § 129, at 948.

73. *Id.*

74. *See, e.g.,* Alsip Homebuilders, Inc. v. Shusta, 6 Ill. App. 3d 65, 284 N.E.2d 509 (1st Dist. 1972). The Alsip court offered the following rationale for the general rule against allowing punitive damages in contract cases:

If the general purpose underlying the law of damages is to promote security and prevent disorder . . . and breaches of contract do not cause as much resentment or other physical or mental discomfort as do wrongs called torts or crimes, then the remedies needed to prevent breaches of contract and satisfy the injured party are not as severe as those needed to punish the tortfeasor or criminal.

*Id.* at 69, 284 N.E.2d at 512.

75. In Illinois, "[p]unitive damages are recoverable [in tort] only where a wrongful act is accompanied by aggravating circumstances such as willfulness, wantonness, malice or oppression." *Glass v. Burkett*, 64 Ill. App. 3d 676, 683, 381 N.E.2d 821, 826 (5th Dist. 1978); *accord* *Smith v. Dunaway*, 77 Ill. App. 2d 1, 5, 221 N.E.2d 665, 667 (5th Dist. 1966); *City of Chicago v. Shayne*, 46 Ill. App. 2d 33, 38, 196 N.E.2d 521, 524 (1st Dist. 1964).

76. *See, e.g.,* Getschow v. Commonwealth Edison Co., 110 Ill. App. 3d 522, 534-35, 444 N.E.2d 579, 587-88 (1st Dist. 1982); *Doremus v. Hennessey*, 176 Ill. 608, 52 N.E. 924 (1898).

77. *See, e.g.,* Ledingham v. Blue Cross Plan for Hosp. Care, 29 Ill. App. 3d 339, 330 N.E.2d 540 (5th Dist. 1975). In *Ledingham*, the defendant denied the plaintiff medical benefits under a health care plan. The court recognized that "[p]unitive damages may properly be awarded" in a tortious interference action. *Id.* at 351, 330 N.E.2d at 549. The court, however, refused to award punitive damages because it found that the denial of benefits was made in good faith. *Id.* at 352, 330 N.E.2d at 549; *cf. Getschow v. Commonwealth Edison Co.*, 110 Ill. App. 3d 522, 534-36, 444 N.E.2d 579, 587-88 (1st Dist. 1982) (punitive damages justified because of defendant's intentional coercion and oppression).

counts, the breach of contract action, claiming compensatory damages, and the interference action, claiming both compensatory and punitive damages. This procedure will discourage the court from viewing the action as primarily a breach of contract case, which would all but preclude recovery of punitive damages.<sup>78</sup>

### C. Limitations

Traditionally, the protection afforded existing contractual rights has been significantly greater than that afforded prospective rights.<sup>79</sup> A party to an existing contract has a definite and enforceable expectation of receiving the benefits of the contract, while a person with a prospective business relationship has a mere expectancy of future economic gain.<sup>80</sup> Courts have persistently refused to accord prospective relations the same dignity as contractually cemented relations.<sup>81</sup> The right to engage in business relationships must be exercised with reasonable regard for others' interests; however, interference in good faith or in pursuit of a bona fide claim of right is not actionable in the absence of either malice or the employment of improper means.<sup>82</sup>

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78. See generally Teeple, *When If Ever Are Punitive Damages Recoverable In An Illinois Contract Action?*, 65 ILL. B.J. 152, 153 (1976). In cases where legal remedies prove inadequate, Illinois courts will not hesitate to enjoin the actions of defendants which constitute interference. Cf. *Illinois Power Co. v. Latham*, 15 Ill. App. 3d 156, 160, 303 N.E.2d 448, 452 (5th Dist. 1973) (injunction did not violate union members' constitutional rights, since demonstrations by union were "anything but peaceful. . . . [and t]he courts of this state and the United States Supreme Court have consistently held that mass picketing and violence, obstruction of ingress and egress, threats, intimidation and coercion may be enjoined"); *Beaton v. Tarrant*, 102 Ill. App. 124 (1st Dist. 1902) (striking workers have right to picket, but may not intimidate fellow workers who continue to work).

Injunctions also have been issued to end secondary boycotts which have interfered with the plaintiff's business by denying access to customers or suppliers. See, e.g., *2063 Lawrence Ave. Bldg. Corp. v. Van Heck*, 377 Ill. 37, 35 N.E.2d 373 (1941); *Maywood Farms Co. v. Milk Wagon Drivers' Union*, 313 Ill. App. 24, 38 N.E.2d 972 (1st Dist. 1942). For additional examples of injunctive relief awarded in tortious interference actions, see *supra* note 16.

79. See *Belden Corp. v. Internorth, Inc.*, 90 Ill. App. 3d 547, 413 N.E.2d 98 (1980), where the court declared: "The sacrosanct contractual relation takes precedence over the conflicting rights of any presumptive interferor, including his right to compete and his own prospective advantage." *Id.* at 552, 413 N.E.2d at 101 (citing PROSSER, *supra* note 2, at § 129). However, "the right to engage in a business relationship is not absolute, and must be exercised with regard to the rights of others. The rights of others most commonly take the form of lawful competition, which constitutes a privileged interference with another's business." *Id.* at 552, 413 N.E.2d at 102.

80. See, e.g., *Belden Corp. v. Internorth, Inc.*, 90 Ill. App. 3d 547, 413 N.E.2d 98 (1st Dist. 1980). The *Belden* court distinguished between the "mere expectancy of future economic gain" in a prospective business relationship and the "certain and enforceable expectation of receiving the benefits of the contract." *Id.* at 552, 413 N.E.2d at 102.

81. The *Belden* court stated that "[a]s the degree of the enforceability of the business relationship decreases, the extent of permissible interference by an outsider increases." *Id.* at 552, 413 N.E.2d at 102.

82. *Id.*; see also *Michigan Ave. Nat'l Bank v. State Farm Ins. Co.*, 83 Ill. App. 3d 507, 514, 404 N.E.2d 426, 431 (1st Dist. 1980) (issue of improper interference with competitor prop-

This rule is justified by a policy favoring free and lawful competition.<sup>83</sup> Competitive interference with another's economic expectancies will not be actionable, even if it results in lost profits or complete ruin.<sup>84</sup> If the competition is carried on with improper motives or ill will, however, and not in the furtherance of the interests of the competitor, or if unlawful means are employed, such competition will not be "privileged."<sup>85</sup>

Where the acts causing interference with contract or prospective advantage constitute independent torts in themselves, "privileges" applicable to those torts also may render the interference nonactionable.<sup>86</sup> Once a court has determined that the alleged interference was "privileged" and lawful, the existence of malice or improper motive on the part of the defendant will be irrelevant.<sup>87</sup>

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erly raised in plaintiff's allegation that defendant used such unfair means as "slander of credit and the use of confidential information").

83. See PROSSER, *supra* note 2, § 130, at 954-55. Section 768 of the Restatement (Second) of Torts sets forth the competitor's "privilege." According to § 768, one legitimately may cause a third person not to enter into or continue a business relation with a competitor of the actor if:

- (a) the relation concerns a matter involved in the competition between the actor and the other and (b) the actor does not employ wrongful means and (c) his action does not create or continue an unlawful restraint of trade and (d) his purpose is at least in part to advance his interest in competing with the other.

RESTATEMENT (SECOND) OF TORTS § 768 (1979).

84. The "pursuit of legitimate business goals" is privileged and one who holds merely a prospective advantage may not avoid such competition through protection of this tort. *Belden Corp. v. Internorth, Inc.*, 90 Ill. App. 3d 547, 553, 413 N.E.2d 98, 103 (1st Dist. 1980). In *Belden*, the defendant made a takeover bid, conditioned upon rejection by shareholders of a previously announced merger between Belden and another company. Belden Corporation charged that the defendant tortiously interfered with the anticipated benefits from the proposed merger. The court dismissed the cause of action for interference with prospective advantage because Belden failed to provide proof of unfair competition. *Id.*; see also *Doremus v. Hennessey*, 176 Ill. 608, 52 N.E. 924 (1898).

85. The unfair competition required by the *Belden* court, in order to support a successful prospective advantage action, "includes fraud, intimidation, or disparagement," and this disparagement must be deliberate, evidencing "malevolent intent." *Belden*, 90 Ill. App. 3d at 553-54, 413 N.E.2d at 103; see also *Michigan Ave. Nat'l Bank v. State Farm Ins. Co.*, 83 Ill. App. 3d 507, 404 N.E.2d 426 (1st Dist. 1980); *Candalaus Chicago, Inc. v. Evans Mill Supply Co.*, 51 Ill. App. 3d 38, 366 N.E.2d 319 (1st Dist. 1977). The *Candalaus* court held that a party may exploit the market to further his own business, but his conduct will not be privileged if motivated only by ill will or spite. *Id.* at 48, 366 N.E.2d at 327. Since it was customary in the paper products industry "for a manufacturer to sell to a distributor-customer of its own distributor-customers," the court held that the manufacturer's competition with its distributor-customer was not "made solely out of spite or ill will" and therefore was not actionable. *Id.* at 49, 366 N.E.2d at 327.

86. See, e.g., *American Pet Motels, Inc. v. Chicago Veterinary Medical Ass'n*, 106 Ill. App. 3d 626, 634, 435 N.E.2d 1297, 1302 (1st Dist. 1982) (in an action in which both defamation and tortious interference were alleged, the "conditional privilege" which applied to the defamation count was held to be equally applicable to the interference count); see also *Gasbarro v. Lever Bros. Co.*, 490 F.2d 424, 426-27 (7th Cir. 1973) (conditional privilege applied to interference with prospective advantage claim as well as to defamation claim).

87. See, e.g., *Bank Computer Network Corp. v. Continental Ill. Nat'l Bank*, 110 Ill. App. 3d 492, 500, 442 N.E.2d 586, 592-93 (1st Dist. 1982) (Continental's offset of defendant's checking

Furthermore, while the right to establish business relationships and the right to enter into contracts are common and reciprocal, they are not absolute. Even interference with existing contracts may be justified in certain situations, such as where the defendant is exercising an equal or superior right.<sup>88</sup> Interference also may be justified in those unusual instances in which the defendant acts to protect an interest deemed to have greater social utility than that of insuring the stability of contract, such as when contractual performance would prove to be injurious to public health, safety or welfare.<sup>89</sup>

#### REPRESENTATIVE "EMPLOYMENT" DECISIONS

Causes of action for interference with contract and prospective advantage frequently arise out of two common commercial settings: the employer-employee relationship and the businessman's relationship with his customers or clients. Claims arising out of employment relationships generally can be classified under three categories: (1) when the employee sues the employer for termination of employment; (2) when the employer sues a third party

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account and dishonor of several of its checks was found to be taken "to protect its own present, existing economic interest" and, thus, was privileged); *cf. Petit v. Cuneo*, 290 Ill. App. 16, 7 N.E.2d 774 (1st Dist. 1937) (large stockholder of corporation was privileged in preventing corporation's payment of excessive fee to plaintiff).

88. *See, e.g., Swager v. Couri*, 77 Ill. 2d 173, 191, 395 N.E.2d 921, 928 (1979) (corporate directors were privileged in liquidating bankrupt corporation because of their duty to shareholders, and the consequent breach of contract with plaintiff architect held not actionable under the doctrine of tortious interference with contract). The *Swager* opinion provides a history of tortious interference with contractual relations and discusses the leading case of *Loewenthal Sec. Co. v. White Paving Co.*, 351 Ill. 285, 184 N.E. 310 (1932). *Swager*, 77 Ill. 2d at 188, 395 N.E.2d at 927. In *Loewenthal*, the court refused to find tortious interference with contract since the corporate officers acted "in accordance with their business judgment and discretion," and such action thus lacked the "requisite malice." 351 Ill. at 300, 184 N.E. at 316; *see also Connaughton v. Gertz*, 94 Ill. App. 3d 265, 418 N.E.2d 858 (1st Dist. 1981) (labor union justified in coercing its members to strike, because company had violated its collective bargaining agreement by hiring nonunion employees); *Worrick v. Flora*, 133 Ill. App. 2d 755, 758, 372 N.E.2d 708, 711 (3d Dist. 1971) (employee's termination of plaintiff's employment contract held to be done within the scope of employment and, thus, was privileged); *Petit v. Cuneo*, 290 Ill. App. 16, 21, 7 N.E.2d 774, 776 (1st Dist. 1937) (stockholder justified in influencing corporation's executive committee to reduce plaintiff's fee, because the stockholder had "a legitimate interest in the amount of compensation to be paid plaintiff").

89. *See, e.g., Connaughton v. Gertz*, 94 Ill. App. 3d 265, 418 N.E.2d 858 (1st Dist. 1981). In *Connaughton*, a union used threats to prevent its members from working for a company that had begun to hire nonunion employees. The court discussed two factors necessary to establish a privilege to interfere with a contract:

First, a third party may purposely bring about a breach of plaintiff's contract with another when he is acting to protect a conflicting interest that is considered under the law to be of a value equal to or greater than plaintiff's contractual rights. . . . Second, the third party's acts that bring about the breach must be legal acts and must not be unreasonable in the circumstances.

*Id.* at 270, 418 N.E.2d at 861 (citations omitted). The court held that, in promoting the strike, the union acted to protect "its members' own valid contractual rights with the employer . . . [and] was privileged to use any reasonable means to bring about a breach of plaintiffs' contract." *Id.* (emphasis added).

(usually a competitor) for wrongfully hiring the former's employee; and (3) when the employer sues the employee for stealing its customers or clients.

In *Pinsof v. Pinsof*,<sup>90</sup> the Illinois Appellate Court for the First District considered a claim for tortious interference with a lifetime employment contract. The plaintiff, who had served as executive vice-president and assistant secretary of Sipi Corporation for forty-eight years, was removed by the board of directors.<sup>91</sup> His interference claim was predicated on the existence of an employment contract, evidenced by a stock purchase agreement and a death benefit agreement.<sup>92</sup> The court held that these agreements were insufficient to constitute an enforceable employment contract, however, and dismissed the complaint because the plaintiff failed to allege any other relationships with the corporation.<sup>93</sup>

The *Pinsof* court adopted the previously discussed hybrid formulation of interference with contract and interference with prospective advantage.<sup>94</sup> The court acknowledged that the *Pinsof* complaint would not have been dismissed had the plaintiff alleged the existence of an expectancy interest or an employment contract terminable at will.<sup>95</sup> In light of *Pinsof*, the practitioner may find it advisable to plead interference claims in the alternative. For example, if a plaintiff is unable to establish the existence of an enforceable contract, he should allege the existence of a prospective relationship or a contract terminable at will. Although claims for interference based on these relational interests are not as protected as those based on contract rights, plaintiffs who assert such claims may avoid the fate of the plaintiff in the *Pinsof* case.

In *Ancraft Products Co. v. Universal Oil Products Col.*,<sup>96</sup> the court considered two related claims arising out of an employment relationship: customer-stealing and employee-stealing. Ancraft, a machinery design and manufacturing corporation, brought suit against one of its customers, Universal Oil Products Company, and a competitor, Peerless Metal Fabricators, Inc.

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90. 107 Ill. App. 3d 1031, 438 N.E.2d 525 (1st Dist. 1982).

91. *Id.* at 1032, 438 N.E.2d at 526.

92. *Id.* at 1032-33, 438 N.E.2d at 526-27.

93. *Id.* at 1034-35, 438 N.E.2d at 529.

94. See *supra* notes 57-58 and accompanying text. This hybrid formula was originally set forth in *City of Rock Falls v. Chicago Title and Trust Co.*, 13 Ill. App. 3d 359, 300 N.E.2d 331 (3d Dist. 1973), when the City of Rock Falls sought to demolish an allegedly unsafe building held in trust by the defendant. The defendant counterclaimed, alleging that the city had interfered with his business advantages, leading to the building's deterioration, primarily because the mayor had failed in his attempt to purchase the building. The mayor threatened "that anyone buying the property would not receive cooperation from the City . . . and would 'probably find it difficult to function.'" *Id.* at 361-62, 300 N.E.2d at 332. The mayor (or other city officials) subsequently refused applications for building permits, told prospective tenants that the building was unavailable, ordered repairmen working on the building to stop all repairs, and told the owner "that no permits for repairs or remodeling would be issued to him." *Id.* at 362, 300 N.E.2d at 333. The court found that the counterclaim adequately stated a cause of action for tortious interference.

95. *Pinsof*, 107 Ill. App. 3d at 1036, 438 N.E.2d at 528.

96. 84 Ill. App. 3d 836, 405 N.E.2d 1162 (1st Dist. 1980).

Mr. Virta, an engineer and designer for Ancraft, supervised certain jobs for Universal. After Virta, who also owned forty-nine percent of Ancraft's stock, unsuccessfully attempted to acquire Ancraft, Universal asked him to submit a manufacturing bid on behalf of Ancraft.<sup>97</sup> Without consulting the owner of Ancraft, Virta acted as Ancraft's agent in submitting the bid, and, subsequently, informed Universal that he was leaving Ancraft. Universal then hired Virta. His departure, along with the loss of other Ancraft employees who accepted jobs with Peerless, eventually destroyed Ancraft's business.<sup>98</sup>

Ancraft had argued that the timing of its employees' departure indicated that the defendants induced these employees to terminate their employment, thereby tortiously interfering with its employment contracts. Failing to find this argument convincing in light of the facts and circumstances surrounding the employment relationship,<sup>99</sup> the court upheld summary judgment against plaintiff.<sup>100</sup> First, the court indicated that Ancraft failed to show that Universal had acted improperly.<sup>101</sup> Second, the evidence that did exist tended to show that Universal acted cautiously, going so far as to consult legal counsel before hiring Virta. Third, Virta had made the initial contact with Universal to offer his services. Moreover, the court noted, Virta had good cause to leave Ancraft, even in the absence of any inducement by the defendants,<sup>102</sup> since he had not been able to gain control of the company. The court further found no evidence that defendants induced the other employees to leave Ancraft, because these employees "had no specialized skills beyond their ability as competent machinists,"<sup>103</sup> and left Ancraft because there was little work after Virta left the company.

The lesson of *Ancraft* is that the existence of suspicious circumstances does not establish an adequate basis on which to ground an interference claim. Nevertheless, in determining the merits of an interference claim, courts will look to the surrounding circumstances, such as the decline in profitability of the business claimant. Therefore, it appears that in the absence of business reasons why employees or customers might terminate a business relationship, courts will be more likely to scrutinize the actions of competitors. Furthermore, in cases in which plaintiffs can establish the existence of questionable conduct on the part of competitors or employees, courts will be more likely to grant relief.

#### REPRESENTATIVE "COMMERCIAL" DECISIONS

Employees and competitors are not the only parties that may deprive a business of existing or prospective benefits to which it is entitled. Many in-

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97. *Id.* at 845-46, 405 N.E.2d at 1168.

98. *Id.* at 845, 405 N.E.2d at 1168.

99. *Id.* at 845-46, 405 N.E.2d at 1169.

100. *Id.* at 845, 405 N.E.2d at 1168.

101. *Id.* at 846, 405 N.E.2d at 1169.

102. *Id.* at 845, 405 N.E.2d at 1169.

103. *Id.*

interference actions result from the relationship of a businessman or professional to customers or clients. These actions can be roughly grouped into three classes: (1) when the customer or client attempts to circumvent the business or professional relationship by dealing directly with third parties in order to avoid paying fees or commissions; (2) when a competitor tries to capture more business by intervening in the plaintiff's relationship with a customer; and (3) when a third party prevents clients or customers from doing business with the plaintiff.

The first class of cases usually involves attorneys, agent-representatives and realtors. It is not uncommon for businessmen to deal with third parties through these intermediaries and later attempt to deal directly with the third party.<sup>104</sup> In so doing, the client or customer may deprive the representative of his rightful compensation. For instance, in *Thorne v. Elmore*,<sup>105</sup> a real estate broker attempted to sell certain properties to a corporate client, whose attorney attended the negotiations. After the parties failed to consummate the sale, the corporate attorney's limited partnership purchased the properties in question.<sup>106</sup> The plaintiff-broker sued the corporate attorney for depriving him of his commission on the sale.<sup>107</sup> In affirming the lower court's ruling against the plaintiff, the appellate court found that there was no contractual relationship and no reasonable expectancy of a business relationship between the plaintiff and the corporation at the time of the purchase.<sup>108</sup> The court concluded that Thorne had abandoned the relationship after the prior negotiations proved unsuccessful, and, therefore, the corporation's attorney, also a real estate broker, was free to purchase the properties.<sup>109</sup>

The *Thorne* court's rationale suggests that the plaintiff might have been successful if the sale had taken place closer in time to the breakdown of the prior negotiations, when the previous relationship was still in existence.<sup>110</sup> Alternatively, if Thorne had maintained contact with the corporation after

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104. See, e.g., *Herman v. Prudence Mut. Casualty Co.*, 41 Ill. 2d 468, 244 N.E.2d 809 (1969) (insurance company dealt directly with attorneys' clients); *Clifton-Strode, No. 2, Inc. v. Kent*, 110 Ill. App. 3d 525, 442 N.E.2d 666 (3d Dist. 1982) (original real estate dealer denied commissions after vendor and purchaser closed the deal directly).

105. 79 Ill. App. 3d 333, 398 N.E.2d 837 (1st Dist. 1980).

106. *Id.* at 345-46, 398 N.E.2d at 844-45.

107. *Id.* at 346, 398 N.E.2d at 845.

108. *Id.* at 334-35, 398 N.E.2d at 840.

109. *Id.* at 345-46, 398 N.E.2d at 845.

110. An offer received by Thorne in January 1972 was not allowed in evidence and Thorne took no action when a previous offer fell through. Apparently, no attempts were made by Thorne between January and April, when the final transaction was completed. In analyzing these facts, the court concluded:

The relationship was apparently abandoned by Thorne after the Butler deal collapsed. To hold Elmore liable for a breach would be to hold that, although there was no specific agreement to do so, the corporations having once unsuccessfully dealt through Thorne were not at liberty to sell their property without his involvement, in spite of his inactivity in that regard. Such a conclusion is neither reasonable nor supported by the evidence.

*Id.* at 346, 398 N.E.2d at 848.

the collapse of the initial deal, the court might have construed this contact as constituting a continuing relationship. Therefore, the best way for plaintiffs to avoid the *Thorne* result is to obtain a written agreement at the outset from the client or prospective client. Such an agreement should identify the nature of the relationship between the two parties.

The second class of commercial cases, appropriately termed "customer-stealing" cases, is illustrated by *Candalaus Chicago v. Evans Mill Supply Co.*<sup>111</sup> In *Candalaus*, the defendant-distributor (Evans) counterclaimed against the plaintiff-manufacturer (Candalaus) for interference with business relationships.<sup>112</sup> Candalaus had been supplying Evans with paper products which Evans then resold to its own customers, who were also distributors of paper products. Candalaus subsequently cut Evans out of the transaction and began selling directly to Evan's customers.<sup>113</sup> In fact, Evans contended that some of the goods sold in this manner still bore Evans's name or logo. The trial court found for Evans,<sup>114</sup> but the appellate court reversed, listing a number of reasons. First, Evans's customers also were distributors and not retail stores or outlets. Second, in the paper products industry it was common for a manufacturer to sell to a customer of one of its own customers. Additionally, the parties had not entered into an exclusive dealing arrangement. Consequently, Candalaus and Evans were competitors with regard to these customers.<sup>115</sup> The court concluded that liability could be imposed on Candalaus only after a showing that it acted maliciously and that it was not acting to further its own interests.<sup>116</sup> Evans was not able to make such a showing.

*Candalaus* demonstrates the extent to which competitors may actively pursue business and financial gain. Only if the competitor acts *solely* out of "malice," used here in the sense of improper motives, will liability be imposed.<sup>117</sup> Thus, even when malice is the primary motivation underlying a transaction or series of transactions, liability will not be imposed on a competitor who is marginally furthering its own business interests.<sup>118</sup>

The third class of commercial cases usually involves the actions of unions in boycotting, or encouraging others to boycott, a particular business. Although much of the law in this area has been preempted by federal statute, cases continue to arise. Most of this litigation deals with nonunion groups that are engaged in boycotting activities. In *Dugan Oil Co. v. Coalition of*

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111. 51 Ill. App. 3d 38, 366 N.E.2d 319 (1st Dist. 1977); *see also* *Doremus v. Hennessey*, 176 Ill. 608, 54 N.E. 924 (1898).

112. *Candalaus*, 51 Ill. App. 3d at 40, 366 N.E.2d at 321.

113. *Id.* at 48, 366 N.E.2d at 327.

114. *Id.*

115. *Id.* at 49, 366 N.E.2d at 327.

116. *Id.* The court relied on *Doremus v. Hennessey*, 176 Ill. 608, 54 N.E. 924 (1898), for the requirement that malice on the part of the alleged interferer is an essential element of the tort of interference with a business relationship.

117. *See supra* notes 84-85 and accompanying text.

118. *See supra* notes 87-88 and accompanying text.



*Area Labor*,<sup>119</sup> a public interest group boycotted all local Shell service stations because Shell operated an area mine staffed by nonunion laborers. The trial court enjoined the boycott because of the irreparable damage being inflicted on the service station owners; the appellate court affirmed this decision.<sup>120</sup> Particularly since the boycott was directed at "neutral" parties—the small businessmen who operated the stations—rather than at Shell, the court held that the constitutional right to "freedom of speech in the form of picketing"<sup>121</sup> did not outweigh the individual gas station owner's right to operate his business free of interference.<sup>122</sup> Thus, the relationship between the parties and the directness and severity of the injury inflicted appear to be significant factors, in determining liability for boycott activities.<sup>123</sup>

### CONCLUSION

Tortious interference with contract and tortious interference with prospective advantage are unique causes of action that combine elements of tort and contract law. By compensating plaintiffs for interferences with existing and expected future business relationships, these causes of action preserve the common law right to enter into and perform lawful contracts. The interference torts, therefore, help delineate the limits of free competition.

In Illinois, courts have addressed interferences stemming from both existing contracts and prospective business relationships. Terminable at will contracts are protected in this same manner. Illinois courts, however, do permit a high degree of interference with prospective advantages. Thus, Illinois' approach is more restrictive than that of California, but more liberal than that of New York.

As in other states, Illinois courts allow successful plaintiffs to recover consequential damages, loss of profits, and, within narrow limits, punitive damages. If the defendant possesses an equal or superior right to that of the plaintiff, however, the interference may be justified or "privileged," and, therefore, not actionable.

As competitive and economic pressures increasingly come to bear on

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119. 98 Ill. App. 3d 126, 423 N.E.2d 1373 (4th Dist. 1981).

120. *Id.*

121. *Id.* at 131, 423 N.E.2d at 1377.

122. The *Dugan* court relied on *Teamsters Local 695 v. Vogt, Inc.*, 354 U.S. 284 (1957); *Meadowmoor Dairies, Inc. v. Milkwagon Drivers' Union of Chicago* No. 753, 371 Ill. 377, 21 N.E.2d 308 (1939), *aff'd*, 312 U.S. 287 (1941), and several other Illinois decisions to support its holding that nonviolent secondary boycotts of a neutral employer may be enjoined. The court stated that a secondary boycott "violate[s] a well-established policy of [the] State . . . the policy which recognizes that a person's business is considered 'property' and is entitled to protection from harm." *Dugan*, 98 Ill. App. 3d at 134, 423 N.E.2d at 1379. The court adopted the requirement for prospective advantage set out in *City of Rock Falls v. Chicago Title & Trust Co.*, 13 Ill. App. 3d 359, 300 N.E.2d 311 (1973), *see supra* notes 58 and 94) and held that, in the instant case, these conditions were "clearly" satisfied. *Dugan*, 98 Ill. App. 3d at 134, 423 N.E.2d at 1379.

123. *See supra* notes 78 and 89 and accompanying text.

American business, instances of actionable interference claims almost certainly will continue to increase. Further development in the law may serve to eliminate some of the inconsistencies and confusion currently surrounding these torts. In seeking to strike a balance between the necessities of modern business and the mandates of fair competition, courts will play an important role in shaping the business environment of the future.

